SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1965

No. 227

JAMES R. BULLOCK,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

Response to the Petition for a Writ of Certiorari to the Supreme Court of Appeals of the Commonwealth of Virginia

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Response to the Petition for a Writ of Certiorari to the Supreme Court of Appeals of the Commonwealth of Virginia

OPINION BELOW

The Decision of the Supreme Court of Appeals of Virginia has been reported in the advance sheets as *Bullock* v. *Commonwealth,* 205 Va. 867. A copy of said opinion appears in the Appendix to the brief filed by the petitioner.

CONSTITUTIONAL PROVISIONS ALLEGEDLY INVOLVED

The petitioner contends that the provisions of the Fifth Amendment to the Constitution of the United States have been violated.

The respondent denies this.

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment, Constitution of the United States:

"No person shall be heard to answer for capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land

or naval forces, or in the militia, when in actual service in time of war or public danger; *nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb,* nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation." (Italics supplied)

QUESTION PRESENTED

Whether The Plea Of Former Jeopardy Is Good If Same Is Based On A Judgment Of Conviction Which Is Not Final And Conclusive And Not In Force At The Time Of The Second Trial, The Said Judgement Of Conviction Having Been Reversed By The Supreme Court Of The State On An Appeal Initiated By The Accused.

STATEMENT OF THE CASE

The petitioner, hereinafter sometimes called the defendant, was indicted at the September, 1963, term of the Corporation Court of the City of Norfolk, Part II, of uttering and attempting to employ as true a certain promissory note in the sum of $1596.00, dated 1-30-1962, well knowing that names purporting to be signed thereon as makers thereof to be forgeries, etc.[1] Another count of the same indictment charged petitioner with forging the said note. Upon this indictment he was found guilty of violating Section 18.1-96

[1] That the said James R. Bullock, alias James Reginald Bullock, to-wit, on the 30th day of January, 1962, in the said City of Norfolk, then and there unlawfully and feloniously did utter and attempt to employ as true a certain writing, to-wit, a promissory note, in the sum of, to-wit, $1596.00, No. 12217, dated 1-30-1962, payable to the order of The Seaboard Citizens National Bank of Norfolk, in the City of Norfolk, Virginia, to be paid at the rate of $66.50 on the 1st of each consecutive month after date, for 24 installments, and which said promissory note purports to be signed by the said Daniel Bigelli and Francis Bigelli, as makers thereof on the face thereof, which said purported signatures of the said Daniel Bigelli and Francis Bigelli, are forgeries, he, the said James R. Bullock, alias James Reginald

of the Code of Virginia (1950) as amended.[2] Judgment was entered on November 22, 1963, by the trial court but it was suspended for a period of sixty days as the petitioner indicated he desired to appeal to the Supreme Court of Appeals of Virginia. On October 12, 1964, that Court reversed the judgment on account of the granting of an erroneous instruction, remanding same for a new trial. See, *Bullock* v. *Commonwealth,* 205 Va. 558, 138 S.E. (2d) 261. We are advised that this case has not been retried.

On January 14, 1964, the petitioner was placed on trial on the second indictment, charging him with larceny of the proceeds of the same note described in the first indictment, *supra.*[3]

On a demand of the petitioner made under Section 18.1-

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[2] If any person forge any writing, other than such as is mentioned in §§ 18.1-92 and 18.1-94, to the prejudice of another's right, or utter, or attempt to employ as true, such forged writing, knowing it to be forged, he shall be confined in the penitentiary not less than two years nor more than ten years, or, in the discretion of the jury or the court trying the case without a jury, he shall be confined in jail not less than six months nor more than twelve months. Any person who shall obtain, by any false pretense or token the signature of another person, to any such writing, with intent to defraud any other person, shall be deemed guilty of the forgery thereof, and shall be subject to like punishment. (Section 18-96, Code of Virginia.)

[3] That James R. Bullock, alias James Reginald Bullock, to-wit on the 30th day of January in the year 1962, in the said City of Norfolk, to-wit $1,596.00 of United States currency of the value of, to-wit $1,596.00 of the goods, chattels and moneys of Seaboard Citizens National Bank of Norfolk, Norfolk, Virginia, then and there being, then and there feloniously did steal, take and carry away, against the peace and dignity of the Commonwealth of Virginia.

Bullock, at the time, aforesaid, that he did so utter and attempt to employ as true the said last mentioned writing, to-wit, said promissory note, well knowing the said signatures thereon to be then and there forged, and well knowing the names of said Daniel Bigelli and Francis Bigelli, purporting to be signed thereon as makers thereof, to be in fact forgeries, and with intent then and there unlawfully and feloniously to defraud, against the peace and dignity of the Commonwealth of Virginia.

109 of the Code,[4] the Commonwealth's Attorney stated that he intended to prosecute under (rely on) Section 18.1-118 of the Code for conviction. Thereupon petitioner filed his plea of *autrefois convict,* a copy of which is filed on pages 4a, 5a and 6a of the Appendix filed with the petition.

The trial court, in overruling this motion, stated on page 12 of Record No. 5938 (Red leaflet):

> "The Court: Mr. Reid, this does not give me much trouble, this section 19.1-259 applies only, I think, in situations of state statutes and municipal ordinances.
>
> "I think that larceny is defined as a separate and distinct act from forgery or from uttering, and it would not be the same act or the same crime in law and in fact as the trial.
>
> "There is no conceivable way that the Defendant could have been convicted of larceny on an indictment charging forgery and uttering.
>
> "I hold that larceny is a separate and distinct offense, and that double jeopardy would not be involved in a trial of this second indictment since the first indictment merely contained counts of forgery and uttering, to which you except."

A conviction resulted. The petitioner was sentenced to three years in the penitentiary. The Supreme Court of Appeals of Virginia affirmed the judgment of the lower court by a *per curiam* opinion which is found on pages 1a, 2a and 3a of said Appendix.

ARGUMENT

The petitioner raises two questions in his argument:

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[4] * * * * On the trial of every indictment for larceny, however, the defendant, if he demands it, shall be entitled to a statement in writing from the attorney for the Commonwealth of what statute he intends to rely upon to ask for conviction. (Section 18-109, Code of Virginia.)

(1) Does a prosecution under the first indictment (uttering a forged instrument) constitute jeopardy and as such bar the subsequent prosecution of the second indictment (larceny)? (Brief and petition, p. 16)

(2) Does the appeal from a prior conviction constitute such a final judgment to allow it to be successfully plead as a former jeopardy to a pending indictment? (Brief and petition, p. 25)

We will answer these questions in the inverse order.

1. Plea Of Autrefois Convict Insufficient

Before this Court can properly consider the matter and argument set forth in the brief and petition filed in this case, pages 1 to 24, inclusive, there must be a showing that this plea is good. The plea is bad because on its face it shows that the judgment of conviction was not final. Even if we assume for the sake of argument that the two offenses were identical before the plea of autrefois convict charge would be good, the defendant (petitioner) would have to plead that the conviction was valid and final.

The Supreme Court of West Virginia was confronted with a similar situation in the case of *State* v. *Taylor* (1947), 130 W. Va. 74, 42 S.E. (2d) 549. The defendant contended that she had been convicted and sentenced by a justice of the peace for an offense which arose from the same set of facts which gave rise to the indictment. The warrant upon which she was convicted was vacated on appeal. The Court, in the course of its decision affirming the judgment of conviction, stated:

"These points, however, not being material to the issue of former jeopardy as raised in this case, need not

be discussed or determined. The plea of former conviction did not allege that the judgment was final and conclusive and the plea was, for that reason, insufficient. 15 Am. Jur., Criminal Law, Section 378. The action of the trial court in rejecting the plea was correct."

A person who has appealed a conviction waives his right to plead former jeopardy. *Cross* v. *Commonwealth*, 195 Va. 62, 77 S.E. (2d) 447. Furthermore, such a person's position is inconsistent for in one instance he contends that he has not been lawfully convicted and in the other contends that he has been convicted of the same offense, and therefore should not be retried for that offense. Thus, he should be estopped to plead the former conviction. The rule is set forth in 22 C.J.S., Criminal Law, Section 273, as follows:

"An accused obtaining reversal on appeal is estopped to plead prior conviction.

"An accused cannot benefit by the verdict of the jury if he chooses to appeal from it; hence, he is estopped to plead a prior conviction where his conviction has been reversed for error on an appeal or writ of error brought by himself; and this is so although accused at the time of the reversal has served a part of his sentence."

See also, 15 Am. Jur., Criminal Law, Section 427:

"It is generally conceded that a person convicted of a crime waives his constitutional protection against being put twice in jeopardy and may be tried again where a verdict against him is set aside and a new trial granted on his motion in the trial court or a conviction is reversed on appeal or error proceedings instituted by him." (Citing the case of Stroud v. United States, 251 U.S. 15, 64 L. ed. 103, 40 S. Ct. 50, and many other cases decided by this Court.)

The second question raised by the petitioner (which we will answer first) is:

> "Does the appeal from a prior conviction constitute such a final judgment to allow it to be successfully plead as a former jeopardy to a pending indictment?"

Petitioner has cited the case of *Bustamante* v. *People*, 136 Col. 367, 317 P. (2d) 885, to substantiate his argument in this connection. In that case, the Court made this comment:

> "Under these facts the State should have awaited the outcome of the first action."

Apparently the Colorado criminal procedure differs from that in Virginia. As an indictment was pending against the petitioner, it was the duty of the State to have the second case tried forthwith lest the Commonwealth would be precluded from trying the case at all. Under the Virginia procedure such a criminal case must be tried within four regular terms of the Corporation Court after the accused is placed in custody, unless the same is continued on motion of the accused or some other circumstances arise. See, Section 19.1-191, Code of Virginia (1950) as amended. It usually takes about a year from the date of trial to process a case through the Supreme Court of Appeals. Hence, the Commonwealth could not have awaited the outcome of the first case before proceeding with the second unless the same had been continued on a motion of the petitioner. It was the petitioner who appealed from the judgment of the trial court and not the Commonwealth. He did not ask for a continuance. Furthermore, in the *Bustamante* case, the Court interpreted a section of the

Colorado Constitution which is not similar to the Virginia Constitution. We do not believe that this case is analogous to the case at bar. Neither is it controlling as it is contrary to the weight of authority.

Likewise, the case of *United States* v. *Olson*, 57 F. 579, which is also cited by petitioner, is not similar nor controlling. The Court held that the judgment of forfeiture was not a bar to the defendant's prosecution for the criminal offense in the indictment. The statement in the opinion relied upon by petitioner is mere *dictum* and apparently contrary to the general ruling so ably expressed by Mr. Justice Clifford in the case of *Coleman* v. *Tennessee*, 97 U.S. 509, 24 L. Ed. 1118, to the effect that a plea of former conviction is bad unless it contains the averment that the prior judgment is in full force and effect and unreversed.

In the *Coleman* case, this Court did not reach the question of whether the plea of *autrefois convict* was valid. It held that such a plea could not be maintained as it would have been an admission that the State Court had jurisdiction to determine the case on the merits. This Court simply held that the State of Tennessee had no jurisdiction to try the accused as the crime was committeed by a federal soldier during the time of the war while the State was one of the insurgent States. The accused had been tried and convicted for the same crime (murder) by a court martial and sentenced to death. The Court, although it ordered the accused released from State custody, directed that he be delivered to the military authorities of the United States to be dealt with as required by law. Mr. Justice Clifford dissented, believing that the judgment of the court martial not having been approved by the President, the same had become inoperative before the plea at bar was filed and was not such a judgment as would support a plea of *autrefois convict*. During the course of his opinion, he discussed the

law on the question of when such a plea was valid. We quote from his opinion:

> "Exceptions of the kind and many others existing to the rule that a former conviction for the same offense is a bar to a pending indictment, show the necessity that the plea should set forth the substance of the proceedings in the former suit, and contain sufficient averments to show that the judgment is unreversed and in full force and effect. Where the judgment in the former suit was in another jurisdiction, the form given for the plea of *autrefois convict,* as given in all the standard writers on the subject, contains the formal averment that the judgment is unreversed and in full force.
>
> * * *
>
> "Speaking of the plea of *autrefois convict.* Chitty says, it is of a mixed nature, and consists partly of matter of record and partly of matter of fact, and he adds, with emphasis, that it is settled to be absolutely requisite to set forth in the plea the record of the former acquittal; and, if so, it is equally requisite that it should be averred that the judgment is unreversed and in full force, as every lawyer of experience in criminal law knows, that, if the verdict was set aside or the judgment arrested at the request of the person convicted, the conviction becomes a nullity. 1 Chitty, Cr. L. 463; *Regina* v. *Drury,* 3 Car. & Kir. 193; *Waller* v. *The State,* 40 Ala. 325."

The doctrine expressed by this learned judge is as sound today as it was in 1878. Clearly, the plea of the petitioner in the case at bar was defective not only in form but in substance. The judgment which he sought to put up as a bar to the second prosecution was reversed on appeal and thereby became a nullity. Furthermore, the judgment was not *in full force* and effect when he entered his plea as it had been suspended on his motion so he could petition the Supreme Court of Appeals of Virginia for relief.

In 61 A.L.R. (2d) 1224, there is an annotation of the cases on this subject. According to this work in the following jurisdictions, the rule prevails that while an appeal from a judgment of conviction is pending, the judgment does not support a plea of former conviction in a subsequent prosecution for the same offense:

Massachusetts—*Commonwealth* v. *Fraher*, 126 Mass. 265.

Oklahoma—*Fay* v. *State*, 62 Okla. Crim. 350, 71 P. (2d) 768.

Texas—*Dupree* v. *State*, 56 Tex. Crim. 387, 120 S.W. 875 and other cases. *Dailey* v. *State*, 162 Tex. Crim. 387, 285 S.W. (20) 733.

West Virginia—*State* v. *Taylor*, 130 W. Va. 74, 42 S.E. (2d) 549.

The reasoning of the Texas Court in the *Dupree* case, ***supra***, is worthy of consideration. We quote from the decision in that case:

> "It would, indeed, be a singular doctrine to hold that because in one case, in prosecutions covering many months, a conviction for violating the local option law had been had, while contesting this conviction and resorting to all the means known to law to escape its result, the appellant would be able to use such conviction, while still denying its force and while suspending its effect, as a shield against prosecution for other sales. If this could be done, it might easily happen that, while contesting the first 13 cases, an acquittal might be obtained in the remaining 12 cases on the ground of former conviction, and finally on appeal a reversal obtained in the first case, and ultimately a judgment of acquittal therein secured. It would thus happen that appellant would secure the benefit of a former conviction in the 12 cases, whereas it might result that in the case used as a shield he would go free, and we would

> have the strange anomaly of 12 acquittals by reason of a former conviction, when finally it should be determined that the appellant was not guilty at all, and he would escape punishment in all 13 cases, in some or all of which he might be guilty, on the ground of a conviction in the trial court, contested by him, in which it had been finally determined that in fact he was not guilty of any offense." (120 SW 873)

Petitioner concedes that the general rule supported by a decided majority that a person convicted of a crime waives his constitutional protection against being put twice in jeopardy when his conviction is reversed on appeal in a proceeding instituted by him. (Brief and Petition, p. 26) This being so, what possible difference would it make from a constitutional standpoint whether the reversal was before or after the plea was made so long as the reversal was ordered before a final judicial disposition of the second case is made. The first judgment of conviction against petitioner was reversed on October 12, 1964, long before the second judgment of conviction (as at bar) was affirmed by the Supreme Court of Appeals of Virginia. (March 8, 1965)

Petitioner also argues that the Supreme Court of Appeals of Virginia has erred in not granting his plea under Section 19.1-259, Code of Virginia.

Section 19.1-259 of the Code is as follows:

> "If the *same act* be a violation of two or more statutes, or of two or more ordinances, or of one or more statutes and also one or more ordinances, *conviction* under one of such statutes or ordinances shall be a bar to a prosecution or proceeding under the other or others. Furthermore, if the same act be a violation of both a State and a federal statute a prosecution or proceeding under the federal statute shall be a bar to a prosecution

or proceeding under the State statute." (Italics supplied)

Conceding for the sake of argument that the offenses charged in the indictments of violating the two statutes in the first and second cases are identical, the provisions of this statute are not applicable. In order that the plea under this section be good, it must be shown that the accused has been finally convicted. The mere proceeding or prosecution which does not result in a conviction does not bar another prosecution in a State court. *Owens* v. *Commonwealth*, 129 Va. 757. When the plea was made in the lower court, the first case (tried on October 16, 1963) the judgment had not become final as the case had been appealed to this Court. That case was subsequently reversed. Hence, defendant does not stand convicted of the offense upon which he was tried on October 16, 1963 (first case).

Assuming that the two offenses upon which the petitioner was tried are identical (which we deny), we submit that the plea of *autrefois convict* fails because the judgment of conviction upon which the plea is based was reversed at the instance of the petitioner and cannot be plead in bar of the present proceeding.

2. Offenses Not Identical

Although we believe that the plea of *autrefois convict* should be rejected for the foregoing reasons and it is therefore unnecessary for the Court to consider the question of whether the offenses were identical, we will not let the argument made by the petitioner on this point go unchallenged. The interpretation placed on the Virginia statutes by the Virginia Supreme Court of Appeals should be accepted by this Honorable Court.

We will now answer the first question raised by petitioner, to-wit:

> "does a prosecution under the first indictment (uttering a forged instrument) constitute jeopardy and as such bar the subsequent prosecution of the second indictment (larceny)? (Petition, p. 16)

It should be borne in mind that the petitioner was charged with the violation of two separate and distinct statutes, to-wit, Section 18.1-96 (uttering a forged instrument) and Section 18.1-118 (larceny—obtaining money under false pretenses).

The rule is well established that prosecutions of a person for separate offenses based on the same transaction do not involve double jeopardy where there are distinct elements in one offense which are not included in the other. 15 Am. Jur., Criminal Law, Section 389. Furthermore, Section 392 of the same authority states:

> "A single act may be an offense against two statutes; and if one statute necessitates proof of a different circumstance or element from that which the other requires, an acquittal or conviction under either statute does not exempt the defendant from prosecution and and punishment under the other."

This Court expressed this rule in the case of *Blockburger* v. *United States,* 284 U. S. 303, 304, 76 L. Ed. 369, in the following language:

> "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is ***whether***

> *each provision requires proof of an additional fact which the other does not.*" (Italics supplied)

The Court, in the case of *Gore* v. *United States,* 357 U. S. 386, 2 L. Ed. 2d 1405, 78 S. Ct. 1280, in affirming the conviction of the accused for the violation of several statutes brought about by a single sale of narcotics, reaffirmed the doctrine laid down in the *Blockburger* case, *supra.* We quote from the opinion in that case (357 U. S. 391):

> "Finally, we have had pressed upon us that the Blockburger doctrine offends the constitutional prohibition against double jeopardy. In applying a provision like that of double jeopardy, which is rooted in history and is not an evolving concept like that of due process, a long course of adjudication in this Court carries impressive authority."

There were two separate offenses committeed by the petitioner at the same time. One was uttering the forged note purporting to be signed by Bigelli and Mrs. Bigelli; the other was obtaining the proceeds of the note from the bank. The two offenses were so closely connected in point of time, it was impossible to separate the evidence relating to either. Being placed in jeopardy for one of these acts is not a bar to the prosecution of the other. The rule is well stated in 21 Am. Jur., 2 Criminal Law, Section 188:

> "The fact that one has been in jeopardy for one act is no bar to a prosecution for a separate and distinct act, though the other act is so closely connected in point of time that it is impossible to separate the evidence relating to either on the first trial. This is the situation where two distinct crimes are committed in one transaction. Further, prosecutions for separate offenses

> based on the same transaction do not involve double jeopardy where there are distinct elements in one offense that are not included in the other. In some jurisdictions, however, multiple prosecutions are not permitted, where, an assault upon, or the murder of, two or more persons is committed by one and the same act, as, for example, by the single discharge of a firearm or by one stroke of a knife or other similar weapon."

Likewise, in the case of *Morgan* v. *Devine,* 237 U. S. 624, 629, 59 L. Ed. 1153, this Court stated:

> "The principle stated by the supreme judicial court of Massachusetts, in Morey v. Com., 108 Mass. 433, was applied, where it was held that a conviction upon one indictment would not bar a conviction and sentence upon another indictment, if the evidence required to support the one would not have been sufficient to warrant the conviction upon the other without proof of an additional fact which the other did not, and that conviction and punishment under one does not exempt the defendant from conviction and punishment under the other statute."

When the petitioner was tried on the "uttering indictment" in October, 1963, it was not necessary for the evidence to show that he had obtained money from the Seaboard Citizens National Bank of Norfolk. All that was required was the showing that petitioner had uttered the forged note.

In the case of *Bateman* v. *Commonwealth,* 205 Va. 595, 600, the Court stated:

> "The word 'utter' is defined in Black's Law Dictionary, 4th ed., page 1716, as meaning 'To put or send [as a forged check] into circulation. * * * to utter and

publish.' It is an assertion by word or action that a writing known to be forged is good and valid.

"May one be found guilty of forgery and of uttering the forged check and of the larceny of the proceeds of the check? The answer is 'Yes,' if the evidence sustains each charge.

"The evidence necessary to establish forgery or uttering a forged instrument is not the same required to establish larceny. One may attempt to employ as true a forged instrument, yet not be guilty of larceny if he obtained no money or property by his action.

" 'A test of the identity of acts or offenses is whether the same evidence is required to sustain them; if not, then the fact that several charges relate to and grow out of one transaction or occurrence does not make a single act or offense where two separate acts or offenses are defined by statute, * * *.' *Hundley* v. *Commonwealth*, 193 Va. 449, 451, 69 S. E. 2d 336.

"Section 18.1-118, Code of 1950, provides:

" 'If any person obtain, by any false pretense or token, from any person, with intent to defraud, money or other property which may be the subject of larceny, he shall be deemed guilty of larceny thereof; * * *.'

"It is well settled in this jurisdiction that proof that the accused obtained money by false pretenses will sustain an indictment for larceny. *Lewis* v. *Commonwealth*, 120 Va. 875, 91 S. E. 174."

In the prosecution of the petitioner under the indictment charging him with larceny—stealing money from the said bank—it was necessary for the evidence to show that he actually obtained money from this bank. Hence, the same evidence was not required to sustain these separate and distinct offenses. The uttering of the forged instrument (note) had been completed before the petitioner obtained the money from the bank. The acts constituting the second offense (larceny) did not really commence until

after the forged note had been uttered. The two offenses did not constitute a continuing crime as argued by the petitioner. After the bank had acted and placed the proceeds of the note to the credit of petitioner's company and at petitioner's disposal, had petitioner been an honest person or had he reflected (after committing the uttering) he could have refrained from using the said proceeds. He did not do this, however, but proceeded to use (obtain) the money so credited to his account. As a matter of fact, as shown by the evidence in the case at bar, petitioner had negotiated at least three other forged notes at the same bank about the same time. Such evidence of similar offenses was clearly admissible as tending to show a general scheme or guilty knowledge and fraudulent intent on the part of petitioner.

Petitioner cites the case of *Henson* v. *Commonwealth,* 165 Va. 829, where the Court quoted language from 8 R.C.L. and so petitioner states that the decision in the case at bar of the Supreme Court of Appeals "is completely adverse to the applicable Virginia rule wherein a plea of *autrefois convict* is concerned."

The author of that work (8 R.C.L.) is careful to point out that "the *final* judgment on the first prosecution will be a bar to the second." Hence, this would not be applicable in the case at bar as there was no final judgment on the first prosecution.

In the *Henson* case, the defendant was on trial for the violation of a statutory offense; that is, failing to stop immediately at the scene of an accident in violation of Code Section 2154 (104) Michie's Supp. 1932. The defendant had already previously been convicted of manslaughter (resulting from the same accident). Manslaughter is not defined by statute in Virginia, being a common law offense. Only the penalty is prescribed by statute. Hence, one offense in *Henson* was statutory and the other a crime at common law. In

the case at bar, both offenses are defined by the statute and are separate and distinct. These two offenses are not carved out of the same set of facts as argued by petitioner. The Court, in the *Henson* case, stated:

> "The accused filed two special pleas: One of former conviction and the other under section 4775* of the Code (as amended by Acts 1920, chapter 118), which provides in part: 'If the same act be a violation of two or more statutes, or of two or more municipal ordinances, conviction under one of such acts or ordinances shall be a bar to a prosecution or proceeding under the other or others.'
>
> * * *
>
> "It is urged with great force that the court should have sustained the two special pleas and that the Commonwealth should not be permitted to carve two separate and distinct offenses from the same continuing transaction."

We believe that where the offenses are defined by statute, the Virginia rule is that which is set forth in *Hundley* v. *Commonwealth,* 193 Va. 449, is controlling to determine whether the offenses are identical. See, *Bateman* v. *Commonwealth, supra.*

The petitioner lays great stress on the proposition that whereas the evidence of Detective White (narrating what petitioner had told him) was the same in both cases, and, therefore, his plea of former jeopardy should have been sustained. Of course, the evidence introduced in the first trial (not objected to by the petitioner) to the effect that the proceeds of the note were credited to the checking account of petitioner's company and under his control was not necessary to sustain the conviction of forgery and uttering of the forged note.

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* Now 19.1-259, Code of Virginia (1950) as amended.

The mere fact that the same acts were proven in both trials does not make the offenses identical. The rule is stated in 21 Am. Jur. (2d), Criminal Law, Section 182, as follows:

> ". . . that act, intent, and violation, no subsequent charge can be based thereon, but there is no identity of offenses if on the trial of one offense proof of some fact is required that is not necessary to be proved in the trial of the other, although some of the same acts may *necessarily* be proved in the *trial of each.*" (Citing *Ebeling* v. *Morgan,* 237 U.S. 625, 59 L. Ed. 1151, 35 S. Ct. 710.) (Italics supplied)

The same authority in Section 108 also stated:

> "The common-law rule and the constitutional provisions against a second jeopardy apply only to a second prosecution for the same act and crime both in law and fact on which the first prosecution was based." (Citing *United States* v. *Adams,* 281 U.S. 202, 74 L. Ed. 807, 52 S. Ct. 269.)

To be identical offenses the same must not only be identical in fact but also in law. *State* v. *Kingsbury* (Washington), 266 Pac. 174. In order to sustain a plea of former jeopardy, the offenses must be identical both in fact and in law. *State* v. *Elliott* (Washington), 124 Pac. 212. We quote from the decision in that case:

> "The information charges the defendant with the crime of forgery in the first degree, committed by uttering as true, to one George E. Johnson, on the 17th day of July, 1911, a certain forged policy of insurance with intent to defraud.
>
> * * *
>
> "The information in the first case, upon which the plea of a former conviction is predicated, charged the defendants with the crime of grand larceny, in that

they acquired the possession of a certain automobile by fraudulently and falsely representing to George E. Johnson that the true name of the defendant Joseph T. Dyer was John A. Arnold.

* * *

"From the facts stated it will be observed that in the first case the appellant was charged with the crime of obtaining goods by means of a false pretense; the pretense being that Dyer was Arnold. In the case at bar he is charged with knowledge uttering a forged instrument with intent to defraud. The evidence shows that the four papers, the mortgage, note, abstract, and policy, constituted, in fact, one security, and were uttered at the same time. Upon these facts, the appellant contends that the transacion was single and indivisible, and constituted only one crime.

* * *

"The first case rests primarily upon securing credit for a false name. This case rests upon knowingly uttering a false instrument with intent to defraud. There is not a complete identity of facts in the two cases. The element of a false name, the gist of the former offense, does not enter into this case. Moreover, this court is firmly committed to the view that, to sustain the plea of former jeopardy the offenses must be identical in both fact and law.

* * *

"The false name was of the essence of the first offense, and the uttering of the spurious security is of the essence of the second offense."

Considering the foregoing, it is manifest that the decision of the Supreme Court of Appeals is supported by the weight of authority (including cases decided by this Honorable Court) where acts committed in one transaction constitute offenses against two statutes necessitating proof of a different element from that which the other requires the conviction of one is not a bar from prosecution under the other.

CONCLUSION

It is submitted that the petitioner has not been denied any rights guaranteed him under the Fifth Amendment to the Constitution of the United States as he has not been placed in jeopardy twice for the same offense.

From the foregoing, it will be observed that there are no new questions raised by the petition for writ of certiorari. The legal principles have already been determined. Therefore, we maintain that the petition fails to present a substantial federal question.

We submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have forwarded a copy of the foregoing Response to Herbert S. Reid, Jr., Esq., Suite 100, 2008 Atlantic Avenue, Virginia Beach, Virginia, Counsel of Record for the petitioner, by depositing the same in a United States post office mail box, with first class postage prepaid, addressed to said Counsel of Record for the petitioner, at his post office address hereinabove set forth, on this 5th day of November, 1965.

D. GARDINER TYLER
Assistant Attorney General